World Chronicle

UNITED NATIONS

PROGRAMME: No. 781 recorded 29 March 2000

GUEST: Ambassador Philippe Kirsch
Chairman, Preparatory Commission
International Criminal Court

JOURNALIST: Minh Vo, Christian Science Monitor
James Bone, The Times of London

MODERATOR: Michael Littlejohns

INTERNATIONAL CRIMINAL COURT

In the past fifty years, more than 250 conflicts have erupted around the world. In addition to the victims who lost their lives, over 170 million people were stripped of their rights, their property and their dignity. Few have been awarded any reparations. These victims were simply forgotten. The International Community now has a unique opportunity to correct this situation in the future – to end impunity for the most serious crimes committed by individuals. The establishment of the International Criminal Court affords such an opportunity. In this edition of **World Chronicle,** Ambassador Philippe Kirsch, Chairman of the Preparatory Commission for the International Criminal Court, discusses the rules, guidelines and agreements necessary for the eventual functioning of the Court.

WORLD CHRONICLE is produced by the Media Division, Department of Public Information, United Nations, New York, NY 10017, U.S.A.

Duration: 28:02"
Executive Producer: Chaim Litewski
Director: Livingston Hinckley
Production Assistant: Corazon A. Icasas

ANNOUNCER: From United Nations Headquarters in New York, this is **World Chronicle**, an unedited interview programme about major global issues.

Here now to introduce our guest is the host of today's **World Chronicle**.

LITTLEJOHNS: I'm Michael Littlejohns, and this is **World Chronicle**.

On the 17th of July 1998 in Rome, 160 nations decided to establish a permanent International Criminal Court to try individuals for the most serious offences of global concern such as genocide, war crimes and crimes against humanity. The agreement was hailed by United Nations Secretary-General Kofi Annan as "a giant step forward in the march towards universal human rights and the rule of law". A Preparatory Commission was established to formulate rules, guidelines and agreements necessary for the eventual functioning of the Court. The Commission has held several sessions at the United Nations Headquarters in New York.

Our guest today is the Chairman of the Preparatory Commission for the International Criminal Court, Ambassador Philippe Kirsch. Joining me to talk with Ambassador Kirsch are Minh Vo of the *Christian Science Monitor* and James Bone of *The Times of London.*

Ambassador Kirsch, welcome to **World Chronicle.**

KIRSCH: Thank you very much.

LITTLEJOHNS: Ambassador Kirsch, first question: why 55 years after the creation of the United Nations is it necessary to have this International Criminal Court?

KIRSCH: It was necessary before but it was impossible before. The idea of the Court is basically to replace a culture of impunity with the culture of accountability. That is, many crimes have been committed in history, particularly in the last few decades, but largely the authors of those crimes went unpunished. After World War II there was a very serious discussion of an international criminal court after Nuremberg and Tokyo. It did not happen because the Cold War made it impossible for the major powers to cooperate among themselves. So then the issue fell through for a while and was revived as a result of two new developments. One was that the end of the Cold War did make it possible for major powers to cooperate on important issues. But the other one is that the end of the Cold War was also accompanied by a series of conflicts, largely internal, during which many of those crimes that you were mentioning were committed. So that created an impetus first to establish the two existing tribunals, the one on Former Yugoslavia and the one on Rwanda. But the establishment of those two tribunals also led to the obvious conclusion that if we continue to

do things this way, it would always be *ad hoc*, it would always involve problems of costs, of start up operations and it always would depend on the goodwill of the Security Council.

LITTLEJOHNS: Ambassador, you know better than I that frankly everything in the United Nations has political overtones. How are you going to keep politics out of this international judicial system?

KIRSCH: The Court is specifically designed not to be a political body. If you look at the statute, which is a very long and developed document, you see a number of provisions that are designed, for example, to prevent frivolous prosecutions or frivolous initiatives by the prosecutor to undertake certain things that are politically motivated. Before the prosecutor can launch an investigation, he has to or she has to ask the pre-trial chamber whether they agree; that is to the body of judges. If they agree that, one, there is a reason to launch an investigation and two, the state concerned is not doing it then the state concerned has to be notified. If the state concerned contests that then the prosecutor has to go back to the pre-trial chamber. If the pre-trial chamber authorizes this again. Then the state concerned has the right to appeal to the appeals chamber of the Court. The whole statute is designed to be a very serious body - judicial body - not at all a political body.

LITTLEJOHNS: But if a state refuses to cooperate with the Court there is no provision for somebody to go in and grab the person who should be indicted?

KIRSCH: Well, there are several answers to that. One is that as long as we don't have a supernational institution we do need state cooperation. You're absolutely right. And that is why wide ratification of the statute of the Court is so important. But you also have another way of triggering the jurisdiction of the Court which is the Security Council. Now, once that has been done and when the Security Council has become involved in things like that it is for a serious reasons. Then, of course, you bring with it or it can bring with it many resources that would otherwise be unavailable.

VO: So the Security Council can trigger a prosecution under Chapter 7 mandate. Does that mean that a crime like future Pol Pots can be prosecuted under the ICC even though, for example, let's say Cambodia is not a signatory to the treaty?

KIRSCH: That's correct. If the Security Council decides to trigger an investigation or to refer a situation to the ICC then none of the normal conditions which is accepted by certain states apply.

VO: But tying the Security Council and the ICC together then, doesn't that make

the ICC a political body? The Security Council is a political animal after all.

KIRSCH: There are limits to what the Security Council can do too. Some states who did want the Security Council to have a right of oversight of the Court generally, as is the case for the two existing tribunals, that was deemed excessive precisely because there is an element in the work that the Security Council does that is unpredictable. So the Security Council can ask the Court not to launch to deal with a particular situation. But that is limited to twelve months. And to do that, the Security Council has to decide to de-seize the Court. So it's more difficult to do than the other way around. And then after twelve months the issue has to be revisited. If the Court is seized of something, of a situation, it is likely to be a very, very, very serious situation. So it is not evident that states on the Security Council would decide not to act.

BONE: Now, the United States, which is known of course as a country of the rule of law, has refused to join the Court. Obviously they have concerns. What do you understand their concerns to be and why has the US not thrown its weight behind the Court?

KIRSCH: Of course, the United States would be in the best position to answer that question but my understanding is that the United States would like the state of the nationality of the accused always to acquiesce to a prosecution before the court. That is the basis of its position and it was not possible to accept that for the states and that is why the United States has not joined.

VO: You're saying that the United States wants, for example, a Yugoslav soldier to have -- for that person to be prosecuted or brought before the Court, the Yugoslav Government, Milosevic, would have to agree with that?

KIRSCH: Well, yes. And that is the unfortunate consequence of what was at least the United States' position because there is a new position, I think, that they are developing that is not yet on the table. The problem is not the United States vis-a-vis the Court. The United States never was a target for the court. The problem is that what the United States considers necessary for itself, or at least in Rome considered necessary for itself, has as a consequence -- at least as a likely consequence -- to protect those people who are the targets of the Court. So what we are trying to do now is to try to bring the United States back into its position of support to the Court but without having those consequences.

BONE: But as far as I understand the statute as it was agreed in Rome, if a US national -- soldier, not soldier -- commits some crime against humanity in country X and is

caught in country X and that country X complains to the International Criminal Court, the International Criminal Court would still prosecute that American soldier and the Americans would never have anything to do with it?

KIRSCH: There is one principle that is fundamental in the operation of the Court and that is that it's the principle of what is a complementarity. The Yugoslav ....

LITTLEJOHNS: Principle of what?

KIRSCH: Complementarity. The Yugoslav and Rwandan Tribunals have the first right to try the people who are arrested. This is not the case of the Court. The Court would intervene only if the State that has jurisdiction is unable or unwilling to carry out a genuine case against the person who has been accused, not necessarily that that state has to prosecute and condemn that person but there has to be something genuinely happening in that state. If that happens, then the Court does not do anything.

BONE: So in the case -- I mean let us stay for the cause of simplicity with this situation with the United States. Say there is a Mai Lai massacre and an American soldier runs amok, mows down all the villagers and the Americans mount a sham prosecution or they mount something that is an ambiguous prosecution but there is a jury and the jury acquits the person because he is an American and everybody else who was killed was another nationality, is that adequate then for the interest of the Criminal Court and that person won't then be subject to the justice of the International Criminal Court?

KIRSCH: Well the principle of a sham trial is why the Court has jurisdiction even though there may have been a trial.

BONE: How do you assess that?

KIRSCH: It is the Court that assesses that. But it is difficult in the case of the United States to envisage that kind of situation with the traditional due process and respect for the rule of law that exists in this country. As I said earlier, it is not the United States that is really thought of in those provisions.

LITTLEJOHNS: Ambassador Kirsch, I understand there is no retroactivity so, for example, in the controversial case of the former Chilean dictator, Augusto Pinochet, it would not be possible to have brought him before the Court. Why was it decided not to have retroactivity?

KIRSCH: Well, because it was of course a lot easier for states to know as they develop something that difficult, that ambitious, to know that they would only deal with

future situations. That whatever may have been done would be no reason for a state not to support the process because what was important when we talk about the Court we really talk about the future. We want to establish something that is going to ensure that people who commit crimes are accountable but also that the court has a deterrent effect. That those people in a position of responsibility a few years or a few decades from now will no longer find it so easy to decide to commit crimes because they know that by then there is an institution that is strong. If the decision had been taken to try to consider past crimes without identifying what they were it would have been, I think, very difficult to achieve the same results.

VO: One of the reasons why the United States did not come aboard in 1998 with the Rome treaty was that it was concerned that its soldiers would be prosecuted because the United States is a superpower and that it would be a politicized move by countries -- for example Iraq, enemies of Washington. What kind of assurances can you give to Washington at this point that such political acts won't occur and that people will not use the ICC to attack the United States needlessly?

KIRSCH: It is impossible to give assurances that someone, not necessarily a state, is not going to try to use the ICC for political purposes because the instrument is available, as it is possible to harass someone in domestic courts. The point I was making earlier was that if that happened the system is such that the intention may have been political but the results would not be. The Court could not, without the guarantee that exists in the statute, fall for that kind of thing.

LITTLEJOHNS: This is **World Chronicle**. Our guest is Ambassador Philippe Kirsch, Chairman of the Preparatory Commission for the International Criminal Court.

BONE: Obviously the statute covers the major, most heinous crimes under international law -- genocide, crimes against humanity and war crimes. I was looking through the statute and I noticed it named for instance the crime of apartheid. How are the elements on the crime of apartheid defined? I mean obviously the system no longer exists. The chance of somebody else setting up a new system which is called apartheid I imagine is rather slim. How would you assess whether something meets the definition of the crime of apartheid for instance?

KIRSCH: Well, this is one of the purposes of what is called the elements of the crime, which is an American initiative, and incidentally I just want to add that the United

States has brought a lot of very positive elements to this statute. Their contribution in Rome on the quality of the statute to me was unequivocally good and their contribution in the Preparatory Commission also is excellent. There's no doubt in my mind. So the United States did propose to establish for each crime a particular set of elements which essentially say that the particular conditions have to exist -- for example if it's attack against civilians we should be in a war, in a conflict situation -- then the person did in fact commit a particular crime and that the person intended to commit that particular crime. Now, in some cases these elements get very complicated because the definition of the statute is quite complicated. In some other cases it is much simpler. In the case of apartheid, this is not finished because out of the three series of crimes that we are dealing with now -- genocide, war crimes and crimes against humanity -- crimes against humanity are more difficult to work on than the other two for two reasons. One, is that because the body of written law, of treaties, is much smaller than say, for example, war crimes where you have long-standing instruments and also because crimes against humanity can be committed on a state's territory irrespective of whether there is a conflict or not. So it's much closer to sovereignty, the core of sovereignty, than the war crime issue is. On apartheid, this has not been ....

BONE: I mean, if you had in any part of the world some racist locality, some local mayor in the south of France who decided that all Algerians must sit in the back of the bus for instance, would that be something that could satisfy the crime of apartheid? It seems to me it's a difficult thing to define because it does not necessarily involve physical injury to anybody.

KIRSCH: Well, first of all, you have for war crimes and for crimes against humanity a chapeau, an introductory sentence, which essentially says that you deal with those crimes or the Court can deal with those crimes only if the commission of those crimes has reached a certain degree of magnitude. For example, systematic attacks against the population. So you have a fairly high standard of proof to meet. You can't just deal with isolated incidents. You have to have in a case like this a very clear and very visible policy to do that and the rest, of course, is a matter of investigating. But it is not any crime that comes before the Court.

LITTLEJOHNS: Ambassador Kirsch, the decision to establish the Court was taken in mid 1998 how soon can we expect it will be carried into effect?

KIRSCH: That is a question to which no one has an answer but let me hazard a

guess . I'd say two or three years.

LITTLEJOHNS: Why so long?

KIRSCH: Well, because to enter into force\, the statute has to have 60 ratifications. Not signatures, ratifications. The number of signatures now is 95, which is quite high. The number of ratifications is seven which is quite low.

LITTLEJOHNS: Seven?

KIRSCH: Seven. But the problem is that for a treaty like the Rome Statute, for a state to be able to comply with the obligation it accepts under the statute you have to have very, very extensive changes to your internal legislation and that is extremely time-consuming. Canada, which obviously is a fairly clear supporter of the statute signed some months after the Rome conference but will only ratify probably this summer. Why? Because it takes an enormous amount of time to go through existing legislation and adjust that legislation to what is contained in the statute. The reason why this number seven has not raised any particular problems as far as I am concerned is that this process is now taking place in many, many states simultaneously. So my sense is that you will have a number of ratifications happening after say two years in a fairly short period of time. So I still think that say counting from today, you have to think about two to three years.

LITTLEJOHNS: Your country, Canada, has ratified?

KIRSCH: No. It signed but it will ratify this summer because the process of preparing the necessary legislation will be ready only by then. The legislation is ready but it's going through parliamentary phases.

VO: You have until June 30th to come up with rules of procedures and evidence in the elements of crime do you think you'd be able to meet that deadline? Are there major sticking points holding you back and what happens after June 30th? Where do you go after that?

KIRSCH: The answer is yes the deadline will be met. First of all, the deadline is not optional. It's something that was imposed by their own conference so we have to do it. Second, the way the Preparatory Commission works, and states behave in the Preparatory Commission, means very clearly to me that this deadline is accepted. There's no element of stalling, of trying to defer issues and not to reach agreement in the hope that we will not achieve. There is this very strong momentum in the Preparatory Commission and our states have concluded yes this deadline would be met. They want the best possible product after

June. So far, the Preparatory Commission has dealt with three issues: rules of procedure and evidence, elements of crimes and aggression for essentially political reasons. That aggression was dealt with although in a lot less time than the other two. But there is a whole series of other instruments that have to be prepared also: a relationship agreement with the United Nations, elements of the relationship agreement with the host country, which is The Netherlands, privileges and immunities, financial rules and regulations, a budget for the first year and the rules of procedure of the Assembly. So that work is only going to start at the November session of this year.

BONE: Obviously this is a huge landmark in the development of international law. A global court with jurisdiction over individual citizens of different countries. In terms of the development of legal systems I think it's true to say that courts normally precede police forces. I'm wondering, in light of the way that domestically your systems have developed in different countries over the years whether you think within a matter of some decades the establishment of a central judicial authority for the world will inevitably lead to the creation of some central police authority?

KIRSCH: It is possible. It is very difficult to assess now the possibilities of the Court and the implications of the Court because you have institutions that have been around for five decades. And even then they're accepted but if something new comes out they are tested. I think what we are seeing now is a momentum that never existed before to make this culture of accountability actually happen. You see that of course with the ICC, you saw that with the two tribunals, you see that with the Pinochet case, you see that with the of punishing criminals in Cambodia. You now have the former dictator Hissene Habre of Chad being indicted also. There is a momentum that never existed before and I think that as that momentum developed and the institutions do acquire the credibility that is necessary for them to function – that is yes, you told us in March 2000 that it will be a serious court, now it has operated for three-four years, yes, it is a serious court – I think there will be new institutional developments. There is in fact a review conference, mandatory review conference, seven years after the entry into force of the statute to review the whole situation and it may well be that at that time ....

BONE: The operation of the Rwanda and the Former Yugoslavia Tribunals, which are of course *ad hoc* tribunals of the Security Council that has actually lent credibility to the whole exercise, wouldn't you say?

KIRSCH: I think that's absolutely correct. There were the same kinds of concerns before then as exist now in the ICC and now obviously there are no major problems with the way they operate. On the contrary.

LITTLEJOHNS: Ambassador, is there anything happening in relation to the Courts as far as Cambodia is concerned because the UN sent a mission to Cambodia to try to get the authorities there to agree to international jurisdiction. Is your Commission involved at all in this?

KIRSCH: No, the Commission only deals with the Court, the International Criminal Court, and the Court only will deal with crimes committed after entering into force. So none of those acts that have been committed before is under its jurisdiction.

VO: Do you have at this point any idea of just what the administrative functions would be like ? How many people would be employed by the Court, how many judges will be sitting on it, just how many cases will be brought before the Court? Is it possible that it will just be inundated with cases and requests?

KIRSCH: Some of that information is in the statute. For example, there will be 18 judges and those 18 judges will be split really into two categories -- those who are specialists in criminal law and those who know international law more generally, particularly international humanitarian law. And the criteria for election of those judges who have to be elected by two-thirds majority of the assembly of states are quite high. Normally the quality of the Court should be good. So you have those. You have the prosecutor, you have a deputy prosecutor, you have a pre-trial chamber, a trial chamber and an appeals chamber so it is a normal structure for a court. The number of cases, of course, is very difficult to anticipate. I don't think the Court would be inundated because it could be inundated only if there was a desire to use it for political ends. You don't have any number of situations that would fall under its jurisdiction and my sense is that this is just impossible. It is not going to happen. So I think the number of cases should be small.

LITTLEJOHNS: Ambassador Kirsch, that's all the time we have. Thank you for being with us on this edition of **World Chronicle**.

Our guest has been Ambassador Philippe Kirsch, Chairman of the Preparatory Commission for the International Criminal Court. He was interviewed by Minh Vo of the *Christian Science Monitor* and James Bone of *The Times of London.*

I'm Michael Littlejohns. Thank you for joining us. We invite you to be with us for

the next edition of **World Chronicle.**

ANNOUNCER: Transcripts of the programme may be obtained free of charge by sending a stamped, self-addressed envelope to **World Chronicle**, United Nations, Room S-827L, New York, N.Y., 10017.

World Chronicle is broadcast worldwide and features guests whose work is concerned with major global issues. This programme is a Public Affairs Presentation of this station from United Nations Radio and Television.